Filed 2/28/12 Cactus Avenue v. Fidelity and Guaranty Ins. Co. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CACTUS AVENUE, LLC, Plaintiff and Appellant, v. FIDELITY AND GUARANTY INSURANCE COMPANY, Defendant and Respondent.	E051787 (Super.Ct.No. RIC471147) **OPINION**

APPEAL from the Superior Court of Riverside County. Mark E. Johnson and Mac R. Fisher, Judges.* Affirmed.

Duke Gerstel Shearer and Andrew F. Lloyd for Plaintiff and Appellant.

Luce, Forward, Hamilton & Scripps and John T. Brooks for Defendant and Respondent.

Plaintiff Cactus Avenue, LLC (Cactus) discovered that linoleum flooring in a building that it owned was buckling, due to moisture or water vapor rising up through the

* Judge Johnson heard and granted the motion for summary judgment. Judge Fisher signed the judgment.

concrete foundation. Defendant Fidelity and Guaranty Insurance Company (Fidelity), which insured the building, denied Cactus's property damage claim. In this action, the trial court granted summary judgment for Fidelity, ruling that the property damage claim was within two separate exclusions in the relevant policy.

We will hold that the claim was within the exclusion for "[s]eepage or leakage of any substance . . . ." Accordingly, we need not decide whether a claim for damage due to *water vapor* would be within the separate exclusion for "[*w*]*ater* under the ground surface pressing on, or flowing or seeping through: [¶] . . . [f]oundations, walls, floors or paved surfaces . . . ." (Italics added.)

I

FACTUAL BACKGROUND

Fidelity insured an office building that Cactus owned in Moreno Valley. The relevant policy excluded losses caused by:

"**Water**. [¶] . . . [¶]

"**(3)** Water under the ground surface pressing on, or flowing or seeping through:

"**(a)** Foundations, walls, floors or paved surfaces . . . ." (Water exclusion.)

The main body of the policy also excluded losses caused by:

"**Substance Seepage or Leakage**. Seepage or leakage of any substance that has manifested and is then continuous or repeated."

Previous policies that Fidelity had issued to Cactus had had an identical "Substance Seepage or Leakage" exclusion.

The relevant policy, however, also included an endorsement entitled, in large, bold letters, "**EXCLUSION — 'MOLD OR OTHER FUNGI,' OR 'BACTERIA' WITH EXCEPTION FOR CERTAIN CAUSES OF LOSS**." This endorsement replaced the "Substance Seepage or Leakage" exclusion in the main body of the policy with the following exclusion:

"**Substance Seepage or Leakage**. Seepage or leakage of any substance, *or the presence or condensation of humidity, moisture, or vapor,* that has manifested and is then continuous or repeated *over a period of 14 days or longer*." (Seepage exclusion; italics added.)[1].

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[1] The policy also included the following exclusion:

"**Negligent work**. Faulty, inadequate or defective: [¶] . . . [¶]

"**(2)** Designing, specification, workmanship, repair, construction, renovation, remodeling, grading, [or] compaction;

"**(3)** Materials used in repair, construction, renovation or remodeling . . . [¶] . . . [¶]

"of part or all of any property on or off the described premises." (Negligent work exclusion.)

However, the negligent work exclusion, by its terms, did not apply if the "excluded cause of loss . . . results in a Covered Cause of Loss . . . ." Thus, as Fidelity accepted below, even if the loss is otherwise within this exclusion, it is still necessary to determine whether it is within either the water exclusion or the seepage exclusion.

Dr. Joseph Lee was one of the principals in Cactus and the Cactus representative primarily responsible for the management of the building. He testified that he was not aware of the change in wording.

Robin Joy worked for a tenant of the building as its facility administrator. Around 2001, Joy noticed tearing and rippling in the linoleum flooring. At some point, when a contractor pulled up a piece of the linoleum, she saw "moisture" under it.

The linoleum was replaced, but the problem recurred. Between 2002 and 2003, it got "slight[ly] worse." In 2003, Dr. Lee observed "bubbling and wrinkling and elevation" of the linoleum. When he lifted up part of the flooring, he saw "[m]oisture" on the concrete slab underneath.

On December 18, 2003, Dr. Lee notified Fidelity that Cactus was making a claim for the damage to the floor.[2]

In April 2005, Fidelity denied the claim, citing the water exclusion and the negligent work exclusion. However, its denial letter included a reservation of rights.

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[2] According to Fidelity's claim file, Dr. Lee reported that the floor had buckled and the concrete was wet. He also stated that "water was coming up through the slab because the original contractor did not use a moisture barrier."

Cactus objected to this evidence, arguing that (1) the claim file was hearsay, and (2) Dr. Lee was not an expert, and thus he was not qualified to opine as to the cause of the damage.

The trial court overruled Cactus's objections. Cactus does not claim that this was error. Accordingly, we would be free to consider this evidence. However, in light of Cactus's admissions in discovery, discussed in part III, *post*, we find it unnecessary to do so.

In February 2006, Fidelity reaffirmed its denial of the claim. Once again, it cited only the water exclusion and the negligent work exclusion. Once again, however, it included a reservation of rights.

In 2007, Cactus hired Mohammad Joolazadeh,[3] a geotechnical engineer, to investigate the cause of the damage. He found no evidence of any water under the ground surface, other than water that was part of the soil.

Fidelity's original interrogatory responses, served in 2009, did not refer to the seepage exclusion. In 2010, however, Fidelity served amended responses specifically asserting that the claim was barred by the seepage exclusion.

In interrogatory responses, Cactus stated: "There has been evidence found of water vapor passing through the foundation and causing damage due to the lack of a vapor barrier." It also stated: "[Cactus] at this time does not have any reason to believe that there was either water or water vapor from *above* the surface of the ground that has caused the damage . . . ." (Italics added.)

In connection with the motion for summary judgment, Cactus listed as undisputed the fact that "[t]he moisture or vapor that caused the damage to the flooring . . . manifested and was continuous or repeated over a period of 14 days or longer."

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[3] The trial court sustained Fidelity's objections to portions of Joolazadeh's declaration. Cactus does not contend that this was error. Accordingly, we have disregarded the excluded portions.

II

PROCEDURAL BACKGROUND

In 2007, Cactus filed this action against Fidelity, alleging three causes of action: (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, and (3) declaratory relief.

In 2010, Fidelity filed a motion for summary judgment. Cactus filed an opposition, including objections to some of Fidelity's evidence. Fidelity filed a reply, similarly including objections to some of Cactus's evidence.

After hearing argument, the trial court granted the motion for summary judgment on all causes of action. It ruled that both the water exclusion and the seepage exclusion applied. It overruled all of Cactus's objections and sustained all of Fidelity's objections. It then entered judgment in favor of Fidelity and against Cactus.

III

THE EVIDENCE OF CAUSATION

Cactus contends that Fidelity failed to introduce admissible evidence of an excluded cause of loss.

First, it argues that its discovery responses failed to establish that the cause was liquid water, rather than water vapor. However, this is relevant, if at all, to the application of the water exclusion, not the seepage exclusion. The discovery responses were sufficient to establish that the cause of the loss was either "moisture" or "water vapor" passing up through the foundation.

Second, it argues that two expert's reports that Fidelity submitted with its motion were inadmissible, because they were hearsay and because the authors were not shown to be qualified experts. The trial court, however, did not admit these reports for their truth, i.e., to prove causation for purposes of Cactus's breach of contract cause of action. Rather, it admitted them solely for the limited purpose of showing that Fidelity relied on them and thus was not liable on Cactus's bad faith cause of action. We therefore consider them solely for that limited purpose.

IV

THE SEEPAGE EXCLUSION

Cactus argues that the seepage exclusion did not apply because (1) the water exclusion, which is specific, prevails over the seepage exclusion, which is general; (2) the seepage exclusion was not conspicuous, plain, and clear; and (3) Fidelity waived the seepage exclusion.

A. *Standard of Review*.

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.]" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

"[I]n moving for summary judgment, a 'defendant . . . has met' his 'burden . . . if' he 'has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or

more material facts exists as to that cause of action or a defense thereto. . . .' [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849, second ellipsis added.) "We review the trial court's decision de novo . . . . [Citations.]" (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65-66.)

B. *Specific Versus General.*

It is a maxim of jurisprudence that "[p]articular expressions qualify those which are general." (Civ. Code, § 3534.)[4] "It is a well settled rule of construction for insurance policies that 'a specific provision relating to a particular subject will govern in respect to that subject, as against a general provision even though the latter, standing alone, would be broad enough to include the subject to which the more specific provision relates.' [Citation.]" (*Southern Cal. Edison Co. v. Harbor Ins. Co.* (1978) 83 Cal.App.3d 747, 759.) This principle, however, properly understood, applies only when the specific provision *qualifies* the general provision.

As the Supreme Court has put it, "Under well established principles of contract interpretation, '. . . when a general and particular provision *are inconsistent*, the latter is paramount to the former.' [Citations.]" (*National Ins. Underwriters v. Carter* (1976) 17 Cal.3d 380, 386, italics added; see also *Autry v. Republic Productions* (1947) 30 Cal.2d

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[4] Cactus characterizes this as "the '*ejusdem generis*' doctrine." Actually, the *ejusdem generis* doctrine is merely one particular application of this maxim. It applies when a statute or contract describes a general category and also lists particular members of the category. In that case, "'" the general term or category is 'restricted to those things that are similar to those which are enumerated specifically.'" [Citation.]' [Citation.]" (*People v. Arias* (2008) 45 Cal.4th 169, 180.) That doctrine is not relevant here.

144, 151 ["That paragraph, being a specific provision governing the parties' rights on the happening of that contingency, is controlling over any general provision from which the defendant might have inferred some inconsistent right or privilege."].) However, if the general and specific provisions can both be given effect, there is no need for any further construction.

Garamendi v. Golden Eagle Ins. Co. (2005) 127 Cal.App.4th 480 is virtually on point. There, a liability policy included a pollution exclusion for claims based on the "'discharge, dispersal, seepage, migration, release or escape of pollutants,'" which were defined as "'irritant[s] or contaminant[s] including smoke, vapor, soot, fumes, acid, alkalis, chemicals and waste. . . .'" (*Id*. at p. 484.) It also included, as an endorsement, a specific exclusion for claims based on exposure to asbestos. (*Id*. at p. 488.) The insured was sued for personal injuries allegedly resulting from exposure to silica. (*Id*. at p. 483.)

The insured argued that, because the policy included "a specific exclusion for claims based on exposure to asbestos, another natural product like silica, a reasonable insured would understand that the pollution exclusion does not apply to claims for exposure to silica, for which there is no comparable explicit endorsement." (*Garamendi v. Golden Eagle Ins. Co.*, *supra*, 127 Cal.App.4th at p. 488.) The court responded: "We are not convinced. In light of the widespread asbestos litigation that has been ongoing for approximately a half-century, it is not surprising that an insurer seeking to exclude coverage for asbestos claims would include an explicit provision making that exclusion unmistakably clear. The effect of such prudence, however, is not to restrict the scope of

the pollution exclusion. The inclusion of a specific provision concerning asbestos claims cannot reasonably be understood to mean that the pollution exclusion is inapplicable to other pollutants not specifically designated in a separate endorsement." (*Ibid*.)

Here, similarly, an insurer could understandably wish to take a belt-and-suspenders approach and thus to exclude losses that fall under either the water exclusion, the seepage exclusion, or both. The water exclusion applied to losses caused by groundwater "pressing on, or flowing or seeping through" certain specified structures. The seepage exclusion applied to losses cause by "continuous or repeated" "[s]eepage or leakage of any substance." There could be losses that were within the water exclusion, but not the seepage exclusion, and vice versa. Neither exclusion was superfluous; they merely had the potential of overlapping, depending on the facts in a particular case. "The presence of two or more potentially overlapping exclusions . . . is unremarkable. A problem would arise only if there were a conflict between an exclusion and a specific grant of coverage." (*George's Inc. v. Allianz Global Risks U.S. Ins. Co.* (8th Cir. 2010) 596 F.3d 989, 994.)

C. *"Conspicuous, Plain and Clear."*

"[I]nsurance coverage is '"'interpreted broadly so as to afford the greatest possible protection to the insured, [whereas] . . . exclusionary clauses are interpreted narrowly against the insurer.'"' [Citation.] '[A]n insurer cannot escape its basic duty to insure by means of an exclusionary clause that is unclear. As we have declared time and again[,] "any exception to the performance of the basic underlying obligation must be so stated as clearly to apprise the insured of its effect." [Citation.] Thus, "the burden rests upon the

insurer to phrase exceptions and exclusions in clear and unmistakable language." [Citation.] The exclusionary clause "must be *conspicuous, plain and clear*."' [Citation.] . . . The burden is on . . . the insurer to establish that the claim is specifically excluded. [Citation.]" (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 648, fn. omitted.)

"Unquestionably, California insurers may rely on endorsements to modify printed terms of a form policy. Moreover, . . . where the terms of an effective endorsement conflict with terms in the main body of such a policy, the endorsement controls. [Citation.] But neither the prevalence of endorsements in the industry nor our recognition that they may validly modify an insurance policy diminishes an insurer's burden in notifying insureds of reductions in otherwise reasonably expected coverage. [Citation.]" (*Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 1208.)

We may assume, without deciding, that the seepage exclusion was not sufficiently conspicuous, because it appeared under a heading that suggested that it applied only to losses involving mold, fungi, or bacteria. The trial court ruled, however, that "even if [Fidelity] failed to give notice of the change in the exclusion, the loss would still be excluded . . . ." It explained that "the Mold endorsement expanded an exclusion that was in the main policy from the inception of the policy. The primary change in the exclusion was to specify that 'repeated' or 'continuous' means a leak or seepage that occurs for over 14 days. Under the facts of this case, however, it is clear that the seepage occurred

over many months if not years, so that the seepage was 'repeated' or 'continuous' even under the previous version of the exclusion."

Aside from arguing that the water exclusion prevails over the seepage exclusion (see part IV.B, *ante*), Cactus does not challenge this reasoning. We agree with the trial court.

"It is a long-standing general principle applicable to insurance policies that an insurance company is bound by a greater coverage in an earlier policy when a renewal policy is issued but the insured is not notified of the specific reduction in coverage. [Citations.] . . . '[An] insurer when renewing a policy may not change the terms of the policy, without first notifying the insured . . . .'" (*Fields v. Blue Shield of California* (1985) 163 Cal.App.3d 570, 579, italics omitted.) Thus, even assuming that the seepage exclusion contained in the endorsement was ineffective, that left the earlier version of the seepage exclusion still in effect.

That version excluded losses caused by "seepage or leakage of any substance that has manifested and is then continuous or repeated." Unlike the seepage exclusion in the endorsement, it did not specifically include "humidity, moisture, or vapor." Nevertheless, both moisture and water vapor are "substances," and Cactus's discovery responses showed that the damage was caused by the seepage or leakage of moisture or water vapor. Moreover, Cactus conceded that that "[t]he moisture or vapor that caused the damage . . . manifested and was continuous or repeated . . . ."

Thus, as the trial court ruled, even assuming the seepage exclusion in the endorsement was unenforceable, Cactus's claim was barred by the previous version of the seepage exclusion.

D. *Waiver*.

Fidelity did not assert the seepage exclusion until a very late point in the process — when it filed amended interrogatory responses in 2010. However, this did not constitute a waiver.

In California, "waiver requires the insurer to intentionally relinquish its right to deny coverage and . . . a denial of coverage on one ground does not, absent clear and convincing evidence to suggest otherwise, impliedly waive grounds not stated in the denial. [Citations.]" (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31-32; see also *Ringler Associates Inc. v. Maryland Casualty Co.* (2000) 80 Cal.App.4th 1165, 1189 ["[a liability] insurer does not waive or relinquish any coverage defenses it fails to assert at the time of its acceptance of a tender of defense, even when it does not make any express and full reservation of rights for a substantial period of time"].)

Here, once Fidelity showed that the loss was within the seepage exclusion, the burden shifted to Cactus to show that Fidelity had intentionally relinquished its right to rely on the seepage exclusion. (See generally Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 845.) There was no evidence of any such intent.

Separately and alternatively, Fidelity avoided any waiver by making an express reservation of rights. Its denial letter stated, "[Fidelity] reserves its rights and does not waive . . . any of its rights, or any of the terms and conditions and provisions of the . . . policy . . . ." Its subsequent letter reaffirming its denial included a similar reservation of rights. Such a reservation is sufficient to prevent a waiver of coverage defenses. (*Garamendi v. Golden Eagle Ins. Co.* (2004) 116 Cal.App.4th 694, 721.)

E. *Effect on the Other Causes of Action*.

Because there was no coverage under the policy, Fidelity cannot be held liable on Cactus's cause of action for bad faith. (See Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2010) Bad Faith, ¶ 12:45, p. 12A-15, and cases cited.) The fact that there was no coverage is similarly dispositive of Cactus's cause of action for declaratory relief.

V

DISPOSITION

The judgment is affirmed. Fidelity is awarded costs on appeal against Cactus.

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RICHLI
Acting P.J.

We concur:

KING
J.

MILLER
J.